

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
EASTERN DIVISION  
NO. 4:12-CV-00154-D

NORTH CAROLINA ENVIRONMENTAL )  
JUSTICE NETWORK, NEUSE )  
RIVERKEEPER FOUNDATION, INC., )  
and WATERKEEPER ALLIANCE, INC., )  
Plaintiffs, )

vs. )

MR. DONALD TAYLOR, MS. )  
ANNIE TAYLOR, individually and )  
d/b/a/ TAYLOR FINISHING, MR. )

JUSTIN T. MCLAWHORN and )  
MR. AARON MCLAWHORN, )  
Defendants. )

**DEFENDANTS JUSTIN T.  
MCLAWHORN'S AND AARON  
MCLAWHORN'S MOTION TO  
DISMISS COMPLAINT**  
F.R.C.P. 12(b)(1), (12(b)(6)  
and 12(b)(7)

The Defendants, Justin T. McLawhorn and Aaron McLawhorn (the "McLawhorns"), by and through their undersigned attorneys, hereby move the Court to dismiss Plaintiffs' Complaint and Amended Complaint against the McLawhorns pursuant to Rules 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure, because this Court lacks subject-matter jurisdiction and for failure to state a claim upon which relief can be granted. The Affidavit of Aaron McLawhorn has been filed in support of the McLawhorn's Rule 12(b)(1) motion to dismiss. In further support of this motion, the McLawhorns state:

1. Plaintiffs have sued the McLawhorns under the citizen suit provisions of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6972. In Count Three of the Complaint and Amended Complaint, Plaintiffs allege violations of RCRA by the McLawhorns.

2. RCRA § 42 U.S.C. sec. 6972(b) requires that, prior to commencing a citizen suit, a plaintiff give advance written notice to the alleged violator. Failure to give proper notice in strict compliance with the requirements of 42 U.S.C. sec. 6972 deprives the Court of subject

matter jurisdiction over the suit and constitutes a procedural defect, resulting in a failure to state a claim upon which relief can be granted. Exhibit A and B to the Complaint and Amended Complaint show that proper notice was not given to the McLawhorns.

3. Plaintiffs have failed to allege in their Complaint and Amended complaint that all required conditions precedent to their suit against the McLawhorns have been met.

4. All claims against the McLawhorns stated in the Complaint and Amended Complaint should be dismissed under Rule 12(b)(1) and 12(b)(6) because of Plaintiffs' failure to serve a proper notice of intent to sue on the McLawhorns, and otherwise satisfy required conditions precedent, prior to filing the Complaint and Amended Complaint.

WHEREFORE, the McLawhorns respectfully request that the Court dismiss the Plaintiffs' claims against the McLawhorns pursuant to Rules 12(b)(1) and 12(b)(6).

This 27th day of September, 2012.

/s/ Lars P. Simonsen

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/s/ John W. King, Jr.

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*Attorneys for Defendants Justin T. McLawhorn,  
and Aaron McLawhorn*

## CERTIFICATE OF SERVICE

I, John W. King, Jr. Post Office Box 1654, New Bern, North Carolina 28563, certify:

That I am, and at all times hereinafter mentioned was, more than eighteen (18) years of age;

That on the 27th day of September, 2012, I served copies of the foregoing pleading on the parties shown below as indicated. I certify under penalty of perjury that the foregoing is true and correct.

This 27th day of September, 2012.

/s/ John W. King, Jr.  
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